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IN THE

Supreme Court of the United States

October Term, 1958

HOTEL EMPLOYEES LOCAL NO. 255, HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION, et al., *Petitioners,*

v.

BOYD LEEDOM, individually and as Chairman, National Labor Relations Board, et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMERICAN HOTEL ASSOCIATION *AMICUS CURIAE*

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The Interest of the *Amicus Curiae*

This brief is submitted on behalf of the American Hotel Association *amicus curiae* with the written consent of both the petitioners and the respondent.

The American Hotel Association is a membership trade association with offices at 221 West 57th Street, New York City and Wyatt Building, Washington, D. C. Its members are state hotel associations which are

located in every state of the United States as well as in Canada, Hawaii, Mexico, Puerto Rico and other islands of the West Indies. These state and territorial hotel associations presently have a membership of 5424 hotels with a total of 611,543 rooms. These hotels range from very small establishments located in villages to large commercial hotels in cities. The membership also includes residential hotels and resort hotels.

The present proceeding is of direct and immediate interest to every hotel in the American Hotel Association which is located within the United States or its territories. The primary issue in the proceeding is the contention of the petitioners that the National Labor Relations Board cannot continue its long-established policy of refusing to assert jurisdiction in labor disputes involving hotels. The Court's decision in this proceeding will have a direct bearing upon the labor relations practices of every hotel in the Association.

When the present petitioner, Hotel Employees Local No. 255, was given a full hearing in the matter by the National Labor Relations Board in August, 1955 the American Hotel Association was allowed to appear before the Board and present its position. The American Hotel Association did not participate in the subsequent proceedings in the District Court or in the Court of Appeals.

The history of the proceedings are set forth in detail in petitioners' brief and will not be repeated here. The petitioners have pointed out that the proceedings originated in their efforts to obtain recognition by Miami Beach hotels as the collective bargaining representative of employees in such hotels and that upon refusal to recognize the petitioners, there were twenty-two

separate strikes by the employees. The additional statement should perhaps be made here that since the commencement of the proceedings, many of the Miami Beach hotels have signed collective bargaining agreements with the petitioner Local No. 255.

The position taken by the petitioner Hotel & Restaurant Employees and Bartenders International Union in this proceeding is the reverse of the position which it took in *Hotel Association of St. Louis,* 92 N. L. R. B. 1388 (1951), at which time it urged the Board not to take jurisdiction of hotel cases.

It should also be pointed out that at the oral argument before the National Labor Relations Board, counsel for the Miami Beach Hotel Association pointed out that that Association was not the collective bargaining representative of the hotel employers and that many of the hotels named in the original petition were not members of that Association.

Argument

1. The Decision of This Court in the Office Employees Case Is Not Controlling

In *Office Employes Union* v. *National Labor Relations Board,* 353 U. S. 313 (1957), this Court held that the Board was not authorized to refuse jurisdiction of a labor dispute solely because the employer was a labor union. An examination of the decision in that case discloses substantial differences from the situation in the present proceeding in two material respects: First, the refusal by the Board to take jurisdiction in the *Office Employes* case represented a reversal of an established policy of the Board theretofore in effect. Second,

it was directly contrary to the affirmative action taken by Congress to bring unions under the Act. This Court found that the question of exempting labor unions completely from the provisions of the Act had been presented to Congress on two occasions but that instead of exempting such labor unions when acting as employers, Congress had specifically included them within the definition of "employer" in Section 2(2) of the Act.

In refusing to take jurisdiction in the *Office Employes* case, the Board treated labor unions as analogous to certain other nonprofit organizations over which the Board had refused to exercise jurisdiction. This Court found that such analogy was unwarranted, particularly in the face of clear Congressional intent that unions as employers were not to be an exempt class. The opinion also points out that the Congressional Committee Report expresses an intent that certain other nonprofit organizations were considered outside of the coverage of the Act in most cases. Where Congress specifically treats two separate groups of employers in two different ways, the Board could not make one analogous to the other. It is clear that the Board cannot treat all "labor union as employer" cases as a class and decline jurisdiction solely because a case falls within such class. However, we do not read the *Office Employes* decision as holding that the Board can never refuse jurisdiction over some other class or group of employers if valid reasons exist for such refusal.

The present proceeding presents a completely different situation. Here we find an established policy of the Board in effect since the creation of the Board in 1935 not to take jurisdiction of hotel cases generally on the ground that it would not effectuate the policies

of the Act. In the present case we find no Congressional action disapproving this policy. On the contrary, we submit that there is substantial evidence that Congress approved it. The Board did not base such refusal on the ground that the hotels were analogous to any other class of employers but on the well-founded belief that Congress believed that labor disputes in hotels generally did not have a substantial effect on commerce. For these reasons, the decision of this Court in the *Office Employes* case is not controlling.

2. The Board's Long-Standing Policy of Declining Jurisdiction in Hotel Cases Has Been Approved by Congress

The power of the Board to decline jurisdiction upon the grounds that it would not effectuate the policies of the Act has been sustained by this Court.[1] There is nothing in the Act which requires the Board to implement this policy on a case-by-case basis. The Board has long recognized the impracticality of receiving petitions in every labor dispute, no matter how unsubstantial may be their effect on commerce or however unimportant to the national welfare, only to dismiss the great majority of such petitions upon the ground that in the particular case it would not effectuate the policies of the Act. Instead, the Board very sensibly adopted from time to time rules or standards or practices which are published and which act as a guide to persons involved in labor disputes. In the case of hotel employers generally, this policy has been long-standing and constant. It has been supported and even urged in the present proceeding by the petitioner Hotel & Restaurant Employees and Bartenders International

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[1] *N. L. R. B.* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951).

Union.[2] The policy of declining jurisdiction in hotel cases generally was known to and approved by Congress which has refused to approve amendments to the Act which would have reversed or compelled reversal of its policy.

The petitioners in the present proceeding urge that the Board had no such policy prior to its decision in *Hotel Association of St. Louis* which was decided in 1951. In the courts below and here they urge that Congress could not have approved the Board policy (of declining jurisdiction) in 1947 when it enacted the Labor Management Relations Act because no such Board policy existed in 1947 or prior thereto or was called to the attention of Congress.

This contention of the petitioners must fall for two reasons: First, it is contrary to their own statement made to Congress in 1947 describing such policy and, second, Congress then refused their suggestion that the law be amended to direct the Board to take jurisdiction of hotel cases. At the hearings before the Senate Committee on Labor and Public Welfare, Mr. Charles E. Sands, educational representative of the Hotel & Restaurant Employees International Alliance and Bartenders International League of America,[3] made a statement on March 13, 1947. His comment appearing in the official record of these hearings includes the following:

> "The National Labor Relations Board over the years has investigated many hotel labor disputes,

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[2] In *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), the petitioner Hotel & Restaurant Employees and Bartenders International Union intervened and specifically urged the Board to continue its established policy of declining jurisdiction in hotel cases.

[3] Apparently the former title of one of the present petitioners or in some way affiliated with it. Both were represented by the same counsel in *Hotel Association of St. Louis*,

> but has up to this time never accepted jurisdiction in such cases."[4]

In the face of this statement on behalf of one of the petitioners (or its affiliate), it cannot now be argued by that petitioner that the Board did not have an established policy in hotel cases generally prior to 1947.

At the same hearing Mr. Sands submitted an opinion from an attorney suggesting that a specific direction from Congress would probably be necessary to get the Board to take jurisdiction in hotel cases, using the following language:

> "To accomplish this we suggest an amendment to section 1 which is concerned with the findings and policy of the act. We would suggest that after section 1 (c) a section be inserted which would provide: 'Affecting, restraining or controlling the movement of persons travelling in interstate commerce.' Such an amendment would amount to a specific direction to the National Labor Relations Board that it was the intent of Congress to make the act applicable to hotels."

In the face of these statements made by its affiliate, it is surprising that one of the petitioners can now urge that there was no such Board policy prior to 1947 or that Congress was unaware of such policy at that time.

For the present argument it is enough to point out that Congress refused to approve such amendment. These quotations demonstrate three things: First, that the petitioners recognized as early as 1947 the existence of an established policy of the Board; second, that Con-

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[4] Senate Committee on Labor and Public Welfare, Hearings on S. 55 and S J Res. 22, 80th Congress, 1st Sess. Part 4, pp. 2343, 2344.

gress was aware of such policy before the present law (Labor Management Relations Act) was enacted and, third, that Congress refused to direct a change in such policy.

The action of Congress in rejecting the proposed amendment to compel the Board to take jurisdiction coincides with the statement subsequently made by Senator Taft in answer to a question from Senator Pepper.[5] The Board could hardly have had a clearer guide nor a firmer expression of approval for its established policy.

The attempt to have the Act amended in 1947 to compel the Board to take jurisdiction of hotel cases having failed, the petitioner Hotel & Restaurant Employees and Bartenders International Union reversed its policy. In 1951 in *Hotel Association of St. Louis* it specifically urged the Board not to take jurisdiction of hotel cases generally. The official record of the argument before the Board in that case[6] sets forth a strong plea on behalf of that petitioner urging the Board not to take jurisdiction. Among the statements

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[5] ". . . The Taft-Hartley Law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce . . . It was not my intention in 1947, nor do I believe it was the intention of other members of the Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done . . . A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry . . ." [Congressional Record 81st Cong., 1st Sess., pp. 12697 and 12698; also quoted in decision of Board in *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 and in the Opinion of the District Court in the present proceeding, 147 F. Supp. 306].

[6] *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), Case 14-RC-899, Official Report of Proceedings pp. 57, 60.

made in the argument by petitioner's counsel were the following:

> "Here is the largest union that is concerned in this industry, and it says to you, 'we don't want you to take jurisdiction. There is no need.' "[7]

On the question of the "long established" policy of the Board, the petitioners' argument included the following:

> "But getting back to the question of policy of the Board over the years, in the White Sulphur Springs Company case, where the Board enunciated what was a well established policy of not taking jurisdiction in hotels, you pointed out there that the policy was at that time fourteen years old and that there has not been any complaint about it. That is true."[8]

On the question of Congressional knowledge of the policy, the petitioner made the following statement:

> "The Congress passed the Taft-Hartley Act with full knowledge of the experience of the Board and attitude of the Board and did not change it. So you accepted that as the adopted policy of the nation."[9]

In 1949 the Board itself had made specific reference to its policy as being long-standing and in accordance with its interpretation of Congressional intent in *White Sulphur Springs Company*, 85 N. L. R. B. 1487 (1949) and did so again in *Hotel Association of St. Louis.*

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[7] *Hotel Association of St. Louis*, 92 N. L. R. B. 1388 (1951), Case 14-RC-899, Official Report of Proceedings p. 60.

[8] id. at p. 57.

[9] ibid.

During the period of almost ten years since the *White Sulphur Springs* decision, Congress has made no change in the Act to compel the Board to take jurisdiction in any case. A bill to do so, introduced by Senator Lehman (S. 2651, 84th Congress) on July 27, 1955, was not even reported by committee.

It seems clear that Congress has been satisfied since 1935 with the Board's policy of exercising its discretion to decline jurisdiction at least in hotel cases although fully informed of such policy.

Some confusion may be created by the citations of hotel cases arising in the District of Columbia and the Virgin Islands. Under the different language of the Act conferring jurisdiction, the Board asserted jurisdiction in a small number of hotel cases arising in the District of Columbia. Within the scope of its discretion to accept or decline jurisdiction, the Board's action in taking this jurisdiction in this limited group of cases was appropriate. However, the Board is not required by law to adhere to any fixed policy in matters in which it believes that Congress has conferred discretion. Changed conditions may warrant changes in such policy unless such change would violate the intent of Congress. The policies and standards must necessarily be subject to change. Such a change of policy is evidenced in *Virgin Isles Hotel Inc.*, 110 N. L. R. B. 558, (1954) and the reasons for such change are fully set forth in the Board's decision in that case.

As evidence that the Board did assert jurisdiction of hotels in the United States outside of the District of Columbia, reference has been made below to the

Vanderbilt Hotel case[10] and the inference is made that the Board asserted jurisdiction in that hotel case. This is incorrect as the record of the proceeding before the Board in that case will disclose. The Board there refused to approve the stipulation of settlement upon the ground that it would not take jurisdiction of hotel cases generally under its established policy. Its policy was not only established but consistent.

It is interesting to point out that the policy of the Board not to take jurisdiction of hotel cases generally was not an arbitrary and inflexible one, followed blindly and without exception if the facts warranted otherwise. In the present proceeding, the Board allowed a full hearing with oral argument before declining to assert jurisdiction and nothing was developed at that argument to take the case out of the general pattern of the hotel industry. As an example of the Board's willingness to make an exception if circumstances require it, we cite *Phillips Petroleum Company* v. *N. L. R. B.*, 206 Fed. (2d) 26 (1953). In the *Phillips* case the employer urged the Board to decline jurisdiction in a case involving hotel employees. The Board asserted jurisdiction, notwithstanding, on the ground that these hotel employees belonged in a unit with other employees of the company whose activities clearly had a substantial effect upon commerce. Absent any showing of such special facts at the hearing in this case the Board was justified in following its general practice in hotel cases, a practice which it believed had Congressional approval.

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[10] Case 10-CA-577 (1949).

3. The National Labor Relations Board has Discretionary Authority Under Section 9(c) of the Act to Refuse to Assert Jurisdiction in Representation Proceedings

The discretionary power of the Board to assert less than the full measure of its jurisdiction in the interest of better effectuating the policies of the Act has received the sanction of this Court. *National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra.* This discretionary power was given because the Board, due to the great volume of business, has never been able to assume the full extent of its jurisdiction. Also, as recognized by District Judge Morris in his opinion below, it has been established that Congress intended to lodge in the Board rather than in the Courts the power to determine what employer-employee relationships so affect interstate commerce as to require the exercise of the powers granted to the Board. *National Labor Relations Board* v. *Stoller,* 207 Fed. (2d) 305, 307 (1953), cert. den. 347 U. S. 919; *Optical Workers Union* v. *National Labor Relations Board,* 227 Fed. (2d) 687, 691 (1955), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963.

The Board takes the position that a hotel employer may be engaged in activity affecting commerce within the meaning of the Act. *Hotel Association of St. Louis,* 92 N. L. R. B. 1388 (1951). Nevertheless, in the exercise of its discretion, the Board has refused to take jurisdiction over cases involving the hotel industry generally on the ground that the activities of the industry are essentially local in nature and have relatively little impact on interstate commerce and in the belief that this policy has the approval of Congress. Thus, in the *Virgin Isles Hotel* case, *supra,* a case

which arose in a territory of the United States over which Section 2 (6) gives the Board plenary powers, the Board refused to assert jurisdiction in a case involving a hotel, stating:

> "While it is true that the operations of this employer are not wholly unrelated to commerce, the relationship to commerce is no greater here than in the case of a hotel operating in any of the forty-eight states and we do not believe that the impact on commerce is sufficient in either instance to warrant the assertion of jurisdiction."

Despite this judicial approval of the policy, petitioners contend that with respect to representation proceedings brought under Section 9 (c), such discretion does not exist. In support of this contention, petitioners point out that under Section 10 (a) the Board is "empowered" to prevent unfair labor practices, but that such permissive language is not found in Section 9 (c) which states that upon the filing of a representation petition:

> "The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon due notice."

The petitioners also note that the above-quoted language represents a change in the language of Section 9 (c) of the original act, which provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy * * *."

Petitioners urge that this change in verbs indicates the Congressional intent to give the Board no choice but to exert the full measure of its jurisdiction in representation proceedings.

It is submitted that petitioners' suggested interpretation of Section 9 (c) is without support in the legislative history of this section, and that the pertinent references indicate that the language of Section 9 (c) was amended for another purpose and the discretionary power of the Board with respect to representation proceedings was left untouched. To this effect is Senate Report No. 105, 80th Cong., 1st Sess., 1947, which shows the reasons for and the intended effect of the change on page 10, as follows:

> "Despite the absence of discriminatory language in the act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. * * * This of course puts a premium upon raiding and jurisdictional rivalries. The committee bill would make it necessary for the Board to entertain petitions from employees irrespective of the type of relief sought. It does not change the Board's rules of decision with respect to requirements of substantiability in order to obtain a hearing * * *."

Thus it is clear that the existence of discretionary power with respect to representation proceedings is supported by Congress as well as the Courts. To hold in the manner suggested by the petitioners would involve the Board in countless cases of small import which would, in turn, defeat the basic policy of the Act which Congress declared in Section 1 to be the elimination of "the causes of certain substantial obstructions to the free flow of Congress * * *." It is also interesting to point out that, although not required to do so, in this case the Board permitted oral argument of the matter before the entire Board so that it cannot be

claimed that the petition was dismissed casually or offhand. Its action was certainly not capricious or arbitrary.

Conclusion

The action of the National Labor Relations Board in declining to assert jurisdiction in this case and dismissing the representation petition filed by the petitioners was within the authority given to the Board by Congress and for that reason the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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